Supreme Court, U.S.
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No. 95-1725

In The

Supreme Court of the United States

October Term, 1995

GOLDEN GATE HOTEL ASSOCIATION,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO; TENDERLOIN HOUSING CLINIC, INC.; RANDALL M. SHAW; BRADFORD PAUL; NORTH OF MARKET PLANNING COALITION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a facial challenge to a local ordinance under the Takings Clause of the U.S. Constitution is timely when brought more than ten years after the ordinance was enacted.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

CORRECTION OF MISSTATEMENT IN PETITION OF QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

A. The Residential Hotel Ordinance 3

B. Petitioner's Facial Taking Claim 5

REASONS FOR DENYING THE PETITION 6

I. THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS 7

II. THE DECISION OF THE NINTH CIRCUIT IS CONSISTENT WITH THIS COURT'S DECISIONS 8

A. The Decision Below Is Consistent With This Court's Holding That All Civil Rights Actions Against Nonfederal Defendants Must Be Brought Pursuant To § 1983 8

B. The Decision Of The Circuit Court Is Consistent With This Court's Decisions That A Facial Taking Claim Accrues At The Time The Challenged Regulation Is Adopted 11

III. EVEN IF PETITIONER'S FACIAL TAKING CLAIM COULD BE BROUGHT DIRECTLY UNDER THE CONSTITUTION, IT WOULD BE TIME-BARRED 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 11

Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980) 8

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 10

Bullock v. City and County of San Francisco, 221 Cal. App. 3d 1072 (1990) 5

Carlson v. Green, 446 U.S. 14 (1980) 10

Davis v. Passman, 442 U.S. 228 (1979) 10

De Anza Properties X, Ltd. v. County of Santa Cruz, 936 F.2d 1084 (9th Cir. 1991) 13

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 10

Frustuck v. City of Fairfax, 212 Cal. App. 2d 345 (1963) 13

Golden Gate Hotel Ass'n v. City and County of San Francisco, 18 F.3d 1482 (9th Cir. 1994) 1, 7, 13

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 12

Hunt v. Robeson County Dep't of Social Services, 816 F.2d 150 (4th Cir. 1987) 8

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 12

Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977) 8

Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 127 L.Ed.2d 217 (1994) 11

TABLE OF AUTHORITIES – Continued

Page

Mitchum v. Foster, 407 U.S. 225 (1972) 9

Morris v. Washington Metropolitan Area Transit Auth., 702 F.2d 1037 (D.C.Cir. 1983) 8

Pennell v. City of San Jose, 485 U.S. 1 (1988) 12

Rogin v. Bensalem Township, 616 F.2d 680 (3rd Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) 8

Terminal Plaza Corp. v. City and County of San Francisco, 177 Cal. App. 3d 892 (1986) 5

Thomas v. Shipka, 818 F.2d 496 (6th Cir. 1987) 7

Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979), *cert. denied*, 449 U.S. 1016 (1980) 8

Ward v. Caulk, 650 F.2d 1144 (9th Cir. 1981) 7

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9

Wilson v. Garcia, 471 U.S. 261 (1985) 7, 9, 10, 13, 14

Youakim v. Miller, 425 U.S. 231 (1976) 2

STATUTES

U.S. Const. Amend V ..... *passim*

28 U.S.C. § 2401 13

42 U.S.C. § 1983 ..... *passim*

San Francisco Administrative Code

§ 41.2 4

§ 41.3 4

§ 41.4 4

§ 41.6 4

§ 41.12 4

§ 41.13 4

OPINIONS BELOW

Respondents disagree with petitioner's citation to the opinions below insofar as petitioners contend that the Orders of the District Court dated June 2 and September 9, 1993, set forth in petitioner's Appendix at 24a-61a, are at issue in this appeal. Those District Court Orders were vacated by the Ninth Circuit Court of Appeals in *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994).

On remand, the District Court held that petitioner's facial taking challenge to San Francisco's Residential Hotel Conversion Ordinance was barred by the one-year statute of limitations. *See* petitioner's Appendix 4a-8a. The Ninth Circuit affirmed that decision, relying solely on the statute of limitations. *See* Memorandum Decision, petitioner's Appendix at 1a-3a. Neither the District Court nor the Ninth Circuit reached the merits of petitioner's facial taking claim.

CORRECTION OF MISSTATEMENT IN PETITION OF QUESTIONS PRESENTED

The Petition for Writ of Certiorari misstates the questions for review. The second question presented by petitioner – whether San Francisco's Residential Hotel Conversion Ordinance ("HCO") is unconstitutional on its face – is not before the Court. The District Court did not rule on the constitutionality of the HCO because the District Court found that petitioner's claim was time-barred. Accordingly, the only issue on appeal to the Ninth Circuit, and thus before this Court, is whether the statute

of limitations bars petitioner's facial taking claim. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (Supreme Court generally does not decide questions not "involved" in or essential to lower court decision).

STATEMENT OF THE CASE

The petition should be denied because the decision below is consistent with the decisions of this Court, as well as every Circuit Court that has considered the issue, and does not raise an important question of law. The lower courts correctly applied the one-year statute of limitations under 42 U.S.C. § 1983 to petitioner's facial takings challenge to the City's ordinance. Under the applicable statute of limitations, petitioner's claim was untimely.

The relief petitioner seeks in this case is truly unprecedented: petitioner seeks a determination that a facial takings claim against state or local ordinances can be brought *at any time*. Petitioner argues that state and local governments should have no repose from facial takings claims, even if the suit is filed more than 100 years after a law is enacted. Such a radical position has no support in the case law or sound public policy.

In order to circumvent the statute of limitations bar, petitioner contends that it has a direct cause of action under the Takings Clause, resulting in a longer statute of limitations. However, every Circuit Court of Appeal that has addressed the issue has found that given the availability of 42 U.S.C. § 1983, no direct constitutional claim

against state or local government defendants exists under the United States Constitution.

Moreover, even if a direct constitutional claim independent of § 1983 were permitted, petitioner's action is still time-barred because it was filed more than ten years after enactment of the Residential Hotel Ordinance. Ten years is longer than any conceivably applicable statute of limitations. Accordingly, the petition should be denied.

Supreme Court Rule 15.2 now provides that a respondent's failure to point out misstatements of law or fact in the brief in opposition to a petition for a writ of certiorari could be deemed a waiver of an objection to any misstated matter should the Court grant the petition. Although the facts of this case are not relevant to this petition because petitioner's claim was properly dismissed as untimely, respondents nevertheless provide the Court with the correct background facts in compliance with Rule 15.2.

A. The Residential Hotel Ordinance.

In the years preceding 1979, the City and County of San Francisco ("City") faced a growing loss of rental housing. One major reason for this loss was the increasing conversion of residential hotel units to non-residential tourist use. After years of debate and study the City, in 1979, adopted ordinances designed to protect the existing residential housing stock by regulating future conversions of residential housing to non-residential uses.

In two separate ordinances, the City restricted the conversion of both apartment units and residential hotel units. As a result, all residential rental units in the City

became subject to restrictions on conversion to non-residential use. The Residential Hotel Unit Conversion and Demolition Ordinance ("HCO"), codified in Chapter 41 of the San Francisco Administrative Code, is at issue in this case. *See* petitioner's Appendix at 62a-117a. The purpose of the HCO is:

> to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition.

HCO § 41.2; Petition at 62a-63a.

In its findings in support of the HCO, the San Francisco Board of Supervisors adopted a study by the Department of City Planning that concluded that almost 20% of residential hotel units in the City were lost between 1975 and 1979 due to demolition and conversion, primarily to tourist use. HCO §§ 41.3(d), (f), (k); Petition at 63a-65a.

The HCO took as its starting point the *actual use* of hotels on September 23, 1979, and only regulated *changes in use* after that date. HCO §§ 41.4(c), 41.6, 41.12, 41.13; Petition at 68a, 73a, 93a, 95a. Like traditional zoning controls, the HCO permits owners to continue the residential and tourist use in existence at the time of adoption of the HCO. *Id.*; *see also*, HCO § 41.4(s); Petition at 71a. However, residential units could thereafter be converted to non-residential use only if the owner obtained a permit to convert upon satisfying specified replacement housing conditions. HCO §§ 41.12, 41.13; Petition at 93a, 95a.

Petitioner completely mischaracterizes the HCO as requiring "certain landowners to place their private properties in public service as single room occupancy hotels

for indigents, without payment of any compensation." Petition at 3. In fact, the HCO does not shift the burden of providing housing onto owners. Like zoning, the HCO simply restricts subsequent changes in use; it permits the continuation of uses that existed at the time of enactment. Contrary to petitioner's contention, the HCO does not require owners to rent to anyone. The HCO operates just like residential zoning in that owners can comply with the lawful use restriction or sell to an owner who will.

The HCO is a rational legislative response to the loss of the City's limited housing stock. Since the enactment of the HCO in 1979, residential hotel owners have raised two Fifth Amendment challenges to the HCO in the California courts. In *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892, 911-12 (1986), the California Court of Appeal rejected a challenge that the HCO on its face constituted a "taking" of property without just compensation. Four years later, the Court of Appeal again held that the HCO does not effect a facial taking of property without just compensation. *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072, 1089 (1990).

B. Petitioner's Facial Taking Claim.

On September 30, 1991, more than ten years after enactment of the HCO, petitioner Golden Gate Hotel Association, an association of San Francisco residential hotel owners, filed the instant lawsuit to declare the HCO facially unconstitutional as a taking of property without just compensation. Petitioner did not challenge the HCO as applied to a particular residential hotel. Respondents

timely filed answers and raised the statute of limitations as an affirmative defense.

In August 1994, the District Court granted respondents' motions for summary judgment based on the statute of limitations and entered judgment for respondents. Petitioner appealed the District Court's judgment that the facial taking claim is barred by the statute of limitations.

In a memorandum opinion issued on January 23, 1996, the Ninth Circuit affirmed the judgment. The Circuit Court found that petitioner's facial challenge to the 1979 HCO was barred by the one-year statute of limitations for § 1983 claims. Petitioner did not file a request for rehearing under Rule 40 or a petition for rehearing en banc under Rule 35 of the Federal Rules of Appellate Procedure. On April 22, 1996, petitioner filed the instant petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

This Court's Rules provide for certiorari only where (1) there is a conflict among the decisions of the court of appeals; (2) a court of appeals has decided an important question of federal law that should be settled by this Court; or (3) a court of appeals has decided an important question of law that conflicts with the decisions of this Court. Rules of the Supreme Court, Rule 10.

The instant petition satisfies none of these criteria. The lower courts concluded that petitioner's facial takings challenge to the HCO was barred under the applicable statute of limitations. The Ninth Circuit's decision in

this case does not conflict with any decision of this Court or any other Circuit Court of Appeals. Moreover, the Ninth Circuit's decision did not raise an "important" legal question, but only applied the established statute of limitations to bar petitioner's claim.

The statute of limitations for a challenge to a state or local regulation under the U.S. Constitution in California is one year. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482, 1485 (9th Cir. 1994). Because petitioner filed its complaint challenging the HCO on its face more than ten years after the HCO was enacted, the Court of Appeals correctly dismissed petitioner's claim as untimely.

I. THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS.

In order to avoid the bar of the one-year statute of limitations applicable to actions under 42 U.S.C. § 1983, petitioner argues that it can bring a facial taking challenge to the HCO directly under the United States Constitution. Petitioner further contends that there is no statute of limitations applicable to such actions.

Petitioner's argument has been rejected by every court that has addressed the issue. All have found that claims arising under the Constitution must be brought pursuant to 42 U.S.C. § 1983. *See, e.g., Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) ("Ward has no cause of action on the federal constitution claims because the defendants he wishes to hold liable are all amenable to suit under 42 U.S.C. § 1983"); *Thomas v. Shipka*, 818 F.2d 496, 503 (6th Cir. 1987) (court rejects plaintiff's assertion

of direct claim under Constitution and holds that § 1983 provides the exclusive remedy for plaintiff's constitutional claims); *Hunt v. Robeson County Dep't of Social Services*, 816 F.2d 150, 152 n.2 (4th Cir. 1987) (cause of action against local officials for unconstitutional conduct could only proceed under § 1983); *Rogin v. Bensalem Township*, 616 F.2d 680, 686 (3rd Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) (no direct constitutional claim where § 1983 is available); *Bishop v. Tice*, 622 F.2d 349, 357 (8th Cir. 1980) (same); *Turpin v. Mailet*, 591 F.2d 426, 427 (2d Cir. 1979), *cert. denied*, 449 U.S. 1016 (1980) (same); *Kostka v. Hogg*, 560 F.2d 37, 44 (1st Cir. 1977) (en banc) (same); *see also, Morris v. Washington Metropolitan Area Transit Auth.*, 702 F.2d 1037, 1042 (D.C. Cir. 1983) ("unlikely" that direct constitutional remedy is implied). Accordingly, there is no conflict among the Circuit Court of Appeals warranting review.

II. THE DECISION OF THE NINTH CIRCUIT IS CONSISTENT WITH THIS COURT'S DECISIONS.

A. The Decision Below Is Consistent With This Court's Holding That All Civil Rights Actions Against Nonfederal Defendants Must Be Brought Pursuant To § 1983.

In order to escape the bar of the one-year statute of limitations under § 1983, petitioner argues that its facial taking claim is not subject to § 1983. Petitioner contends that a longer statute of limitations than one year should apply to its direct action under the U.S. Constitution. There is no merit to this argument.

Rather than conferring inferior status on the Takings Clause as petitioner's contend, this Court has treated the protections afforded under the Takings Clause equal to other rights guaranteed in the Bill of Rights. All such claims against state or local defendants must be brought pursuant to § 1983. In other words, the Court has assumed that such claims must be based on § 1983. *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 182, 192 (1985).

Indeed, the very purpose of § 1983 was to provide a plaintiff with a remedy for a violation of a federal constitutional right by a state or local government. This Court has never held that a takings challenge to nonfederal regulation may be brought directly under the United States Constitution.

The statute of limitations applicable in § 1983 actions applies to *all* civil rights actions against state or local public agencies. *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985). In *Wilson*, the Court concluded that a uniform statute of limitations for all actions alleging state violations of federal constitutional rights best served the objectives of repose and certainty that are "the central purposes of § 1983." *Id.*, at 271-72. The Court stated:

> [I]n considering whether all § 1983 claims should be characterized in the same way for limitations purposes, it is useful to recall that § 1983 provides "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."

Id. at 271-72 (*quoting Mitchum v. Foster*, 407 U.S. 225, 239 (1972)).

Accordingly, to allow a direct cause of action to enforce federal constitutional rights against state action – subject to a different statute of limitations than all other civil rights actions – would undermine *Wilson* and the intent of Congress in enacting § 1983. Petitioner's exclusive remedy against the City under the Takings Clause of the federal constitution is by way of § 1983.

Contrary to petitioner's contention, the decision in this case is also consistent with this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987). In *First English*, the Court was presented with the question of whether plaintiff could recover money damages – not merely injunctive relief – for a regulatory taking under the Fifth Amendment. The language in *First English* about the "self-executing character" of the Takings Clause related solely to whether the Fifth Amendment applies to inverse condemnation proceedings. *See id.*; Petition at 12. There is no discussion in the opinion regarding the proper statute of limitations or whether a remedy exists beyond § 1983.

First English does not hold or even suggest that lawsuits for inverse condemnation claims can be brought directly under the Constitution. The opinion is entirely consistent with the requirement that constitutional claims against non-federal defendants must be brought pursuant to § 1983.

Petitioner also cites *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980) for the proposition that plaintiffs may sue directly under the Constitution. Petition at p. 16 n.4. However, in *Bivens*, *Davis*, and *Carlson*, the Court held only that plaintiffs had a direct cause of action under the

Constitution against federal defendants. In those cases the plaintiffs were not entitled to relief under § 1983 or another protective statute. The absence of any other means of redress was a major factor in the Court's finding a right of action directly from the Constitution. Such an implied remedy is unnecessary in this case against non-federal defendants where § 1983 is available to prosecute claims.

B. The Decision Of The Circuit Court Is Consistent With This Court's Decisions That A Facial Taking Claim Accrues At The Time The Challenged Regulation Is Adopted.

As an alternative argument, petitioner contends that the harm inflicted by the HCO is continuing. According to petitioner, no statute of limitations should apply to its facial taking claim. Petitioner confuses facial with as-applied takings challenges.

A facial takings claim is based on the contention that the "mere enactment" of the regulation effects a taking. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Petitioner's argument that the HCO inflicts ongoing, daily violations of hotel owners' constitutional rights simply ignores the important distinction between facial and as-applied claims. As the Ninth Circuit stated in *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 127 L.Ed.2d 217 (1994):

> This argument misapprehends the differences between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute is continuing, or does not occur until it is

> applied. In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

Id. at 688.[1]

Citing three cases of this Court, petitioner asserts that: "[i]t has long been the practice of this Court to strike down facially unconstitutional laws and prohibit their enforcement, without regard to the date of their enactment." Petition at 10-11. Petitioner's contention fails scrutiny.

Notably, in the three cases cited by petitioner, the statute of limitations was not even raised, much less

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[1] This Court has observed that facial takings challenges are heavily disfavored. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987); *see also, Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988). As the Court stated in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981):

> [T]he court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. . . . Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. . . . These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

Id. at 294-95 (citation omitted).

addressed by the Court. Moreover, all of the cases involved specific applications of challenged statutes to individual parties; none of the cases involved a facial takings claim. The decision in this case is fully consistent with this Court's prior rulings.

III. EVEN IF PETITIONER'S FACIAL TAKING CLAIM COULD BE BROUGHT DIRECTLY UNDER THE CONSTITUTION, IT WOULD BE TIME-BARRED.

Assuming the Court were to find that a taking claim could be made directly under the Constitution, petitioner's claim in this case would still be time-barred. Because the Constitution does not provide a statute of limitations, the Court generally adopts the analogous state statute of limitations. *See Wilson v. Garcia*, 471 U.S. at 266-267, n.12. The limitations period for inverse condemnation claims in California is five years. *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 374 (1963). The most analogous federal statute of limitations is six years under 28 U.S.C. § 2401.

Petitioner's complaint was filed more than ten years after the HCO was enacted in 1979. *See Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d at 1483-84 (HCO originally enacted in 1979; "The Ordinance was reenacted in substantially the same form in January 1981 and again, in a slightly modified form, in May 1990"); *see also, De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991) (statute of limitations commences upon adoption of first ordinance where plaintiff

"experienc[es] substantially the same injury" from reenacted ordinance). Thus, whether viewed as a § 1983 claim or a direct claim under the Constitution, petitioner's facial taking claim is still time-barred.

Barring petitioner's facial takings challenge to the HCO does not result in any injustice to petitioner. Even though a facial taking claim was found to be time-barred, the application of the HCO to any of plaintiff's members may be challenged at any time. If, as petitioner contends, the HCO is facially unconstitutional – that is, it cannot be applied constitutionally in any set of circumstances – the defect can be raised through an as-applied challenge by any of petitioner's members. Thus, petitioner's statement that "the facially unconstitutional ordinance could be enforced in perpetuity" is without basis. Petition at 3.

Permitting a facial taking claim to be brought in perpetuity without regard to any statute of limitations would be unsound policy for the additional reason that public entities would be subject to unlimited claims for alleged takings that occurred fifteen, twenty, or two hundred years ago. Like everyone else, government is entitled to repose from stale claims. *See Wilson v. Garcia*, 471 U.S. at 271. If forced to defend facial taking claims for every law or ordinance that was ever enacted, government simply could not function. Allowing government repose does not constitute special treatment of Takings Clause cases, but merely equal treatment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: July 10, 1996

Respectfully submitted,

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